IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

(1) D.B.CRIMINAL APPEAL NO.896/2004
(Brij Lal & Anr. Vs. The State of Rajasthan)

(2) D.B.CRIMINAL APPEAL NO.185/2005
(State of Rajasthan vs. Gajpal Singh & Ors.)

D.B. Criminal Appeals under Section 374(2) Cr.P.C. against the judgment dt.28.8.2004 passed by the Special Judge, SC/ST (Prevention of Atrocities) Act Cases, Merta in Sessions Case No.56/2003(Old No.3/2000,42/2002).

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Date of Judgment: September 5th , 2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

Reportable/-

Mr.J.S.Choudhary, for the appellants in D.B.Cr.Appeal No.896/2004 & in D.B.Cr.Appeal No.185/2005 for complainants

Mr.J.P.S.Choudhary, Public Prosecutor

Mr.Ravindra Acharya, for respondents in D.B.Cr.Appeal No.185/2005 & in D.B.Cr.Appeal No.896/2004 for complainants

BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. These two appeals arises out of the same occurrence alleged to have taken place in the **wee** hours of 12.11.99 in the field known as **Jod Wala Khet** on the outskirt of Village Rohisa in which two persons Mohan Singh and Jeewan Singh died and persons from both the factions sustained fire arm injuries. In D.B.Cr.Appeal No.896/2004 the appellants Brij Lal and Sahib Singh have been convicted of offence under Section 302/34 I.P.C. and sentenced to imprisonment for life and to pay a fine of Rs.5000/-; in default of payment to further undergo six months simple imprisonment and cognate offences by the judgment of the Special Judge SC/ST (Prevention of Atrocities) Act Cases, Merta dated 28th August, 2004 in F.I.R. Case No.137/99, Police Station, Thanwla. In D.B.Cr.Appeal No.185/2005 on the same date the same trial Judge acquitted the accused respondents of offence under Section 302/34 I.P.C. and allied offences. The State has preferred the appeal against the judgment of acquittal.

2. Briefly stated the prosecution case is that on

12.11.99 at about 2.30 P.M., P.W.4 Manvendra Singh submitted a written report Ex.P6 before the s.H.O., Police Station, Thanwla at Government Hospital Rinya Badi stating inter alia that on the same day at about 12 Noon his deceased father Mohan Singh along with deceased Jeewan Singh, P.W.5 Gajpal Singh, P.W.22 Kishan Singh, P.W.1 Choth Nathand others went to see their field in a Jeep. The Jeep was being driven by his deceased father Mohan Singh. After about 30 Minutes it was reported by P.W.22 Kishan Singh and P.W.1 Choth Nath that appellants Brij Lal and Sahib Singh and absconding accused Ram Kunwar and two others obstructed their way and assaulted them. Ram Kunwar fired the gun on Mohan Singh. Sahib Singh fired on Jeewan Singh. As a result of gun shots both of them died on the spot. Brij Lal fired on Gajpal Singh causing fire arm injury. He along with 4-5 others rushed to the spot. The dead bodies of Mohan Singh and Jeewan Singh were sent to the Hospital, where they were declared dead. On this information police registered a case for offence under Sections 147,148,149,323,307, 302 and under Section 3/25 of the Arms Act. The police proceeded with investigation. The police inspected the site and prepared the site inspection memos Ex.P7 &

Ex.P8. The appellants were arrested and the recoveries were made. After completion of the investigation, police laid charge-sheet against the appellants Brij Lal and his son Sahib Singh for offence under Sections 302,307,323,324/34 I.P.C. and Section 30 of the Indian Arms Act. An incomplete charge-sheet was submitted against the absconding accused Ram Kunwar under Section 299 read with Section 173(8) Cr.P.C.

3. The appellants denied the charges levelled against them and claimed trial. The prosecution adduced oral and documentary evidence to prove its case. The appellants in their statement under Section 313 of the Code of Criminal Procedure denied the correctness of the prosecution evidence appearing against them. They pleaded innocence and stated that 25-30 persons in jeeps and tractors entered in their field with a view to take possession forcibly. They destroyed the crop and opened fire the gun. The appellants received gun shot injuries. In the same incident Jeewan Singh and Mohan Singh also sustained injuries and died at the hands of the complainant party. The appellant Sahib Singh examined himself as D.W.1 and Dr.Akhil Gupta as D.w.2. On consideration of the evidence on record the

trial court found the prosecution case proved and as such convicted and sentenced the appellants in the manner stated above.

4. It would be convenient to briefly summarize the findings of the trial court as follows:-

(1) The land dispute was the root cause of hostility between two factions i.e. Prosecution and appellants.

(2) All the prosecution witnesses of occurrence produced by the prosecution namely P.W.1 Choth Nath, P.W.5 Gajpal Singh, P.W.7 Raju @ Rajendra Prasad, P.W.13 Dhukal Ram and P.W.22 Kishan Singh are the interested and partisan witnesses and as such their evidence is required to be scrutinized with care.

(3) The appellants were in cultivatory possession of the land in dispute.

(4) The prosecution succeeded in establishing beyond doubt that appellant Sahib Singh fired the gun causing death of Jeewan Singh. Brij Lal shared the common intention in causing murder of Mohan Singh and Jeewan

Singh and further causing injuries to prosecution witnesses namely Gajpal Singh, Vinod Singh, Kishan Singh and Raju alias Rajendra.

(5) The injuries sustained by the appellants were superficial and as such its non-explanation is of no consequence.

(6) the appellants have failed to give even a probable account of the occurrence as to how Mohan Singh and Jeewan Singh died on the spot. The simple explanation to the effect that to protect their life they opened fire in Air is not sufficient.

(7) The appellants have failed to probablise their plea of right of private defence of person and property.

5. At this stage, it would be convenient to state the facts of the State Appeal in cross case. On 13.11.99 at about 1.30 P.M., S.H.O., Police Station, Merta Shri Jahagir Khan recorded statement of the injured Sahib Singh in the Government Hospital, Merta City. He stated inter alia that he owns a land in the joint ownership of his brother in Village Rohisa. In addition

both the brothers had purchased 64 bighas of land in March, 1999 from Smt.Naresh Kanwar. They were in cultivatory possession of the said land. Their Rohida crop was standing in the half of the field. On the date of incident, they were ploughing the rest of the field. His father Brij Lal, his wife P.W.5 Rajbala, P.W.4 Smt.Krishna W/o Ram Kumar, P.W.6 Miss Raju D/o Ram Kumar and son Sunil Kumar were ploughing the crop in the field. At about 12 – 1 Noon deceased Mohan Singh, deceased Jeewan Singh, Devraj Singh, Gajpal Singh, Kishan Singh, Manvendra Singh, Chotha Ram, Asha Ram, Jagdish, Bhanwaroo, Pushpendra Singh, Dariyav Singh, Dhukal Ram and 5-7 others with the common intention arrived in 3 jeeps and tractors equipped with weapons with a view to get possession over the field illegally. Seeing them his father ran towards the hut. Manvendra Singh fired on them causing injuries on his left leg. Thereafter, Kishan Singh fired on him causing fire arm injury on the back. Pushpendra Singh also fired causing fire arm injuries on the head and hands. His father was having a 12 Bore Gun. He fired 1 or 2 shots in air, then he tried to run away but he was surrounded by the accused persons. Gun shots were fired at him causing fire arm injuries. The accused

persons tried to hit his father by jeep. His father Brij Lal again fired. Thereafter they ran away. On this information, police registered a case under Sections 147,148,149,447,427, 307 & 323 I.P.C. and Section 3/25 of the Arms Act. After usual investigation police filed a charge-sheet against the accused respondents Gajpal Singh, Choth Nath, Dhukal Ram, Vinod Singh and Kishan Singh. They are witnesses of the occurrence in the main case as P.W.5, P.W.1, P.W.13, P.W.16 & P.W.22 respectively. In addition charge-sheet has also been filed against Asha Ram, Jagdish and Bhanwar Singh. In the said case Kishan Singh appeared as defence witness D.W.1. He gave details of the cross case. The trial court found that there was delay in filing the F.I.R.. The trial court has held that the prosecution has failed to establish as to how Mohan Singh and Jeewan Singh died and other accused persons sustained injuries. In view of the non-explanation of the cause of death, the trial court disbelieved the entire case. Accordingly, acquitted the accused respondents by the impugned order.

6. It is contended by Mr.Jagmal Singh Choudhary learned counsel for the accused appellants that it is not safe to place implicit reliance on the prosecution

witnesses of the occurrence as they are highly interested and partisan. They have entered into falsehood to the extent that it has become almost impossible to extract the truth from their statements. They have suppressed the origin of the occurrence, which is evident from the fact that injuries on the accused persons have not been explained leading to the inference that occurrence did not take place in the manner alleged. It is further submitted that the plea of self defence of person and property taken by the appellants is more probable in the facts and circumstances of the case. On the other hand, it is submitted by the learned Public Prosecutor that the occurrence had taken place in the wee hour in which lives of two persons were taken in quick succession, which suggests that the incident must have taken place only in the manner as narrated by the witnesses of the occurrence. It finds corroboration from the medical evidence and other incriminating circumstances. Thus, merely because the witnesses are interested, their evidence cannot be rejected. The conclusion drawn by the trial court on proper appreciation of evidence does not call for interference. It is further submitted that there is no evidence worth the name that the deceased

persons were armed with deadly weapons. Thus, the appellants had no right of private defence either of property or person in the facts of the case.

7. Before we proceed to analyse the prosecution evidence and consider the rival contentions, it would be convenient to refer to the medical evidence, which is common in both the cases. P.W.29 Dr.Tikam Chand Badjatya stated that he was one of the member of the Medical Board, which conducted the autopsy on the dead body of Mohan Singh vide Ex.P53. The Medical Board noticed the following injuries on his person:

> (1) Fire arm wound Thorax - Wound of entrance – 2.5" x 2" in size, oval in shape, deep upto the thoracic cavity, on the left chest wall about 3" Infero-medial to left nipple. Skin edges encircling the wound are charred and blackish in the form of 0.3" rim. Wound of Exit – Nil. Entrance wound in the muscular and bony wall of the thorax is more in dimensions having 4" x 3" dimensions underneath and in continuity with the skin aperture. These are fractures of the ribs in this injury.
>
> (2) Heart and pericardium is badly torn and lacerated. Right lung & pleura – A thorough & thorough wound in the lower lob about 1" in dimension, circular.
>
> (3) Fractures - 5th left rib is dislocated at the costochondral junction. 6th left rib fractured in 3 small fragments underneath the wound. A greyish-white plastic cork and a metalic deformed piece (planoconvex in shape 2.5 cm

x 1 cm) recovered from the thoracic cavity.

In the opinion of the Medical Board the cause of death of deceased Mohan Singh was haemorrhagic shock as a result of injuries to heart and lungs.

8. The Medical Board conducted autopsy on the dead body of Jeewan Singh vide Ex.P54. The Board noticed following injuries on his person:-

> (1) Fire-arm wound Thorax – Wound of entrance – 2.00″ x 1.5″ in size, oval in shape, deep upto the thoracic cavity, on the right chest wall, just below the right sterno-clavicular joint. Skin edges encircling the wound are charred, blackish and shrunken in the form of 0.4″ rim. Wound of Exit – Nil. Entrance wound in the muscular and bony wall of the thorax is more in dimension having 2.5″ x 2″ oval dimensions underneath and in continuity with the skin aperture. There are fractures of manubrium sterni & right rib in this injury.
>
> (2) Medial aspects of upper lobes of both the lungs & pleurae lacerated and torn.
>
> (3) Fractures – upper part (manubrium) of the sternum is fractured to pieces in its right lateral half. First right rib fractured about 1″ from its attachment with the sternum. A deformed metallic piece of bullet(irregular in shape 1″ x 0.5″ in size) recovered from the thoracic cavity.

In the opinion of Medical Board the cause of death of deceased Jeewan Singh was haemorrhagic shock as a

result of injury to the lungs.

9. P.W.26 Dr.Nand Lal stated that he prepared the Medico Legal Injury Report of P.W.5 Gajpal Singh vide Ex.P50. He noticed the following injuries on his person:

> (1) Swelling over eye lid with c/o less of vision, working in redness.
>
> (2) multiple punctured wound approximately six in number measuring from ½ x ½ cm to ¾ x ½ cm cots contused & irregular margins.
>
> (3) Multiple punctured wound approximately seven in number scattered on right side & left side of chest upper ½ measuring from ½ x ½ cm to ¾ cm x 1½ cm in size, margin contused and irregular.

Noticing the Injury No.1 on the eye the case was referred to the ophthalmologist. All the injuries were simple in nature caused by fire arm. In the cross examination, he admitted that he had not taken out any pellet from the body of Gajpal Singh.

10. P.W.28 Dr.S.S.Diwakar stated that he examined Vinod Singh vide Medico Legal Injury Report Ex.P52. He noticed the following injuries on his person.

> (1) Lacerated wound size is about 1/8" x 1/8" x 1/8" placed on the scalp on left parietal region about 3" anterior to left parietal eminence.

(2) C/o not able to hear from left ear with no visible injury.

He stated that all the injuries were simple in nature caused by blunt weapon.

11. P.W.23 Dr.Rajesh Barupal examined Raju @ Rajendra Prasad vide Medico Legal Injury Report Ex.P18 noticing the following injuries:

(1) Healed wound 1" x 1/4" on ventral aspect of right hand between thumb and index finger.

He stated that the injury was simple in nature. He could not give any opinion as to the weapon of offence used as the injury was 15-20 days old.

12. He further stated that he examined Kishan Singh and prepared his Medico Legal Injury Report vide Ex.P46 noticing the following injuries:

(1) Healed spot of 1/4" x 1/4" pinkish white in colour 3" above from right nipple on chest with multiple healed spot around it cyst 0.5 cm sized.

(2) Multiple healed spots round of about .5 cm sized pinkish while in colour on right fore-arm at its middle lateral aspect.

(3) Healed spot 1/4" x 1/8" on fore-head near midline.

He stated that the injury was simple in nature. He could not give any opinion as to the weapon of offence used as the injury was 10-15 days old.

13. D.W.2 Dr.Akhil Gupta stated that on 13.11.99 he was member of the Medical Board which examined injured Brij Lal aged 75 years. He prepared the Medico Legal Injury Report Ex.D22 noticing the following injuries:

> (1) Reddish brown spot of fire arm (Pellets) entrance 0.28 cm, round with induration of 0.85 cm around it on left side of back of chest 6 cm below and 6 cm medial to the tip of acromian process.

In the opinion of the medical board the injury was simple in nature caused by fire arm. The X-Ray report showed presence of round metal piece at the side of lung. The Medical Board referred the case to the Government Hospital at Ajmer. He further stated that on the same day at about 12.30, the Medical Board examined the injuries on the person of appellant Sahib Singh vide Medico Legal Injury Report Ex.D21 noticing following injuries:

> Multiple reddish-brown spots of pellets entrance 0.25 to 0.28 cm, round with induration of 0.8 to 1 cm around it on

(1) Left thigh 36 cm above tibial tuberosity and 6 cm lateral to mid line dorsally.

(2) Left thigh 43 cm above tibial tuberosity, 12 cm lateral to mid line dorsally.

(3) Left 5 cm above knee to mid line ventral surface.

(4) Left knee joint to mid line, ventral surface.

(5) Left leg 9 cm below tibial tuberosity and 10.5. cm lateral to antero mid line.

(6) Left elbow joint. Lateral border.

(7) Right fore arm 17 cm distal to elbow joint dorsal surface.

(8) Fore head left side 7 cm left to globally and 1.9 cm above it.

(9) Left arm, 12 cm above elbow joint.

(10) Left back at lateral border of spinal cord, 6 cm left to mid line.

(11) Left back at L. spinal cord 15 cm to mid line.

In the opinion of the Medical Board all the injuries were simple in nature caused by fire arm. The X-Ray report showed presence of many metallic round pieces.

14. Thus, it is evident that incident led to homicidal death of two and injuries to four persons belonging to prosecution faction. The incident also resulted into injuries to persons belonging to appellants faction.

15. During the trial prosecution examined 31 witnesses which included 4 eye witnesses namely P.W.5 Gajpal Singh, P.W.7 Raju @ Rajendra Prasad, P.W.16 Vinod Singh and P.W.22 Kishan Singh. Before we proceed to analyse the evidence of the material witnesses, it would be convenient to acquaint with the background in which the incident took place.

16. One Moti Singh who was said to be the Jagirdar of Village Rohisa died leaving behind two sons namely Jagdish Singh and Mool Singh. Jagdish Singh died leaving behind his wife Sukhraj Kanwar and daughter Smt.Naresh Kanwar. Mool Singh died leaving behind deceased Mohan Singh. P.W.4 Manvendra Singh is the son of deceased Mohan Singh. On the outskirt of Village Rohisa there is a piece of land consisting 64½ Bighas known as **Jodwala Ki Jamin**. The said land belonged to Jagdish Singh. After the death of Jagdish Singh and his wife the land vested in Smt.Naresh Kanwar the only surviving member in the family. The said land was purchased by the absconding accused Ram Kunwar and appellant Sahib Singh by two separate registered sale-deeds dated 20th February, 1999. The deceased Mohan Singh was in cultivatory possession of his own share of

land known as **Soleh(16) Bigha Wala Khet**. However, deceased Mohan Singh was not happy with the sale of the said land by Smt.Naresh Kanwar. Deceased Mohan Singh gave threatening to accused persons to dispossess them. This led to filing of a revenue suit in the Court of S.D.O., Merta, wherein an injunction was granted vide order dated 8.6.99 restraining the deceased Mohan Singh not to interfere with the possession of Ram Kunwar and Sahib Singh in the land in dispute. The deceased Mohan Singh also filed a suit for cancellation of the sale-deeds. The civil court appointed court commissioner for inspection of the site. However, prayer for injunction in favour of deceased Mohan Singh was declined by the Civil Court. The deceased Mohan Singh lived at Jaipur. On the date of incident he had arrived in the village with P.W.16 Vinod Singh. At this stage it will also be relevant to acquaint with the relations between the deceased persons and the prosecution witnesses. The deceased Jeevan Singh was the uncle of deceased Mohan Singh. P.W.4 Manvendra Singh is the son of deceased Mohan Singh. P.W.5 Gajpal Singh and P.W.22 Kishan Singh are the real brothers. Both were family servants of deceased Mohan Singh. In the local dialect they were known as

Darogas. P.W.16 Vinod Singh pretends to be a distant relative of deceased. On the date of incident he had arrived from Ajmer with deceased Mohan Singh. P.W.13 Dhukal Ram cultivated deceased Mohan Singh's land on share basis for last number of years. P.W.7 Raju @ Rajendra Prasad is the neighbour of Dhukal Ram. P.W.18 Smt.Maina and her husband P.W.21 Champa Lal are said to be independent witnesses not related to deceased Mohan Singh.

17. Coming to the ocular testimony of P.W.1 Choth Nath an employee of deceased Mohan Singh, deposed that the land known as **Soleh Bigha Wala Khet** on the outskirt of Village Rohisa belonged to deceased Mohan Singh. On the date of incident deceased Mohan Singh went to see the crop in a Jeep along with deceased Jeevan Singh and Kishan Singh. He also accompanied them. From there they went to the field of P.W.13 Dhukal Ram. Mohan Singh wanted to talk to him for providing a water channel from his well. The proposal was accepted by Dhukal Ram. They stayed at the field of Dhukal Ram for some time. He had offered tea to them. At that time, P.W.7 Raju also joined them. While they were on way to village Rohisa and passing nearby

the disputed land, abruptly there was firing from the field by Ram Kunwar(absconding accused). Mohan Singh took turn and drove the vehicle in the field. Mohan Singh got down from the Jeep and questioned Ram Kunwar for the abnormal behaviour. Ram Kunwar fired gun hitting Mohan Singh. He jumped from the Jeep and escaped to the nearby field. After five minutes Kishan Singh informed him that two persons have died and he had sustained injuries. He had not seen others firing. He deposed,

"दूसरो को मैने गोली चलाते नहीं देखा। "

He immediately rushed to the village and informed deceased Mohan Singh's son namely P.W.4 Manvendra Singh. In the cross examination he admitted that his father was in employment of deceased Thakur Mohan Singh. After his death he has been serving him for the last 13 years. He used to look after his field. He admitted relations of Gajpal Singh and Kishan Singh with the deceased Mohan Singh stating,

> "यह सही है कि किशनसिंह पुत्र मोहनसिंह एवं गजपालसिंह पुत्र भगवानसिंह मृतक मोहनसिंह के ही दरोगे है। "

He also admitted that Jagdish Singh and Mool Singh used to live separately and they had separate

properties,

> "जगदीशसिंह व मूलसिंह अलग अलग रहते थे, और अलग अलग ही उनकी जायदाद थी व अलग अलग ही उनके रावले है।"

There is a lengthy cross examination with respect to the location of the disputed land particularly with reference to the route from **Soleh Bigha Wali Jamin** and Village Rohisa, which we shall deal with later on. He denied the suggestion that 20-30 persons arrived armed with weapons led by Mohan Singh to take possession over the land sold by Smt.Naresh Kanwar. Suffice it to say that he is witness of the act of firing by absconding accused and not the appellants Sahib Singh and Brij Lal. He has admitted that he had not seen others firing.

18. P.W.5 Gajpal Singh deposed that on the fateful day, P.W.1 Choth Nath informed him that he was being summoned by deceased Mohan Singh for visiting the field namely Soleh Bigha Khet. He accompanied deceased Mohan Singh to the field along with P.W.22 Kishan Singh, deceased Jeewan Singh, P.W.1 Choth Nath and another friend of Mohan Singh. From the **Soleh Bigha** field they went to the field of Dhukal

Ram. Mohan Singh talked to Dhukal Ram with respect to providing the water to his field by a channel. The proposal was accepted by Dhukal Ram. P.W.7 Raju also joined them. All of them left the field in the Jeep driven by Mohan Singh. On the turn, they found that Ram Kunwar fired the gun hitting the Jeep. With a view to defend deceased Mohan Singh took turn and drove the Jeep in the disputed field. He raised his both hands and inquired from Ram Kunwar the reason for firing. Ram Kunwar came close abusing Mohan Singh. He fired the gun hitting Mohan Singh. He died on the spot. He immediately occupied the driving seat and drove the same towards the hut. Appellants Sahib Singh and Brij Lal were at the hut. Appellant Brij Lal fired the gun hitting side mirror of the Jeep. He also sustained injury on the eye. The vehicle lost the balance and dashed against the **saddle** (an agricultural instrument, used with the help of tractor). He put the jeep in reverse gear. However, from the backside Sahib Singh fired the gun hitting Jeewan Singh resulting into his death in the jeep itself. Later on he became unconscious. In the cross examination he admitted that in the land of deceased Mohan Singh known as Soleh Bigha Wala Khet the crop was sworn by P.W.1 Choth Nath. He used to

cultivate the land on share basis. He identified P.W.22 Kishan Singh as his real brother. He denied the suggestion that 30-40 people had collected in the fort belonging to Mohan Singh before he left for the field. The distance between Village Rohisa and **Soleh Bigha** field was 1½ Kms. He denied the suggestion that he had gone to the disputed field with a view to destroy the crop and take possession. He admitted that P.W.16 Vinod had arrived on the same day with deceased Mohan Singh. He also admitted that the police recorded his statement on 29.11.99.

19. P.W.7 Raju @ Rajendra Prasad deposed that on the date of incident he had gone to the field of Dhukal Ram. At that time Thakur Mohan Singh arrived in a Jeep along with Jeewan Singh, Gajpal Singh, Kishan Singh and Choth Nath. Ram Kunwar was moving alone. He started firing indiscriminately. Mohan Singh stopped the vehicle and got down. He raised his hands and inquired for his abnormal behaviour. Mohan Singh drove the vehicle in the field. Ram Kunwar abused Mohan Singh and shot at him as a result thereof he fell down. He fired the gun from a close range. When he fired the gun Mohan Singh was standing outside the

Jeep. Gajpal immediately occupied the driving seat and drove towards the hut. Appellant Sahib Singh fired the gun hitting Jeewan Singh. Jeewan Singh, who was sitting on the rear side of the Jeep died on the spot. Gajpal Singh also sustained injury on the eye on account of gun fire by appellant Brij Lal. He denied the suggestion that he was in the group which had gone on the spot to take possession over the land in dispute.

20. P.W.13 Dhukal Ram deposed that on the date of incident while he was ploughing the field deceased Mohan Singh along with deceased Jeewan Singh, Gajpal Singh, Kishan, Choth Nath and Raju arrived in a Jeep. He talked to him for providing water channel to his field, which was accepted by him. Thereafter, they left in the Jeep towards western side. After 4-5 Minutes he heard of the gun shot fires. He rushed to the site. He had seen Mohan Singh falling on the ground. He pleaded ignorance as to who had fired at him. In the cross examination he admitted that the distance between **Soleh Bigha Wala Khet** and his field is 2 Kms. The proposed water channel was necessarily required to pass through the disputed land. He also admitted that there was gun shot firing for about 5-10

Minutes. He also admitted that he was the cultivator on the field of deceased Mohan Singh,

> "यह कहना सही है कि मैं श्री मोहनसिंह का गत 20-25 वर्षों से काश्तकार रहा हूँ।"

21. P.W.16 Vinod Singh deposed that on 12.11.99 he left Ajmer at about 9-9.30 A.M. in the Jeep with deceased Mohan Singh and reached at Village Rohisa at about 11 A.M. From village Rohisa, he along with Mohan Singh, Jeewan Singh, Choth Nath, Kishan Singh and Gajpal Singh went to the field known as Soleh Bhigha Wala Khet. They found crop of Raiyada standing. From there they went to the field of Dhukal Ram. There deceased Mohan Singh talked to Dhukal Ram for providing water to his field by a channel, which was accepted. After taking tea, they left in the Jeep for Village Rohisa. While they were on the main road, Ram Kunwar, Brij Lal and Sahib Singh and two others met them. They were carrying guns in their hands. Two other persons were carrying Farsies in their hands. They attacked on them. Mohan Singh got down from the Jeep and raised his hands. He inquired for the reason of his abnormal act. Ram Kunwar fired at Mohan Singh from a close range. Mohan Singh fell down and

died on the spot. Thereafter Sahib Singh fired at Jeewan Singh. Brij Lal also fired hitting Gajpal Singh. Kishan Singh started moving the vehicle in the field to save himself. Kishan Singh also sustained pellet injuries. Thereafter, he drove the jeep. He also sustained pellet injuries. In the cross examination, he admitted that deceased Mohan Singh was his uncle in far distance. He was not aware as to his real relationship with deceased Mohan Singh. He had visited Village Rohisa on earlier occasion with deceased Mohan Singh as well. He denied the suggestion that he had gone to the disputed land with Mohan Singh with full preparation to take forcible possession of the land. He also denied the suggestion that number of people had assembled at the house of Mohan Singh in Village Rohisa and then proceeded in the tractors and jeeps for taking possession over the land in dispute.

22. P.W.22 Kishan Singh deposed that on the date of occurrence at about 11.30-12 he accompanied deceased Mohan Singh along with Jeewan Singh, Gajpal Singh, Choth Nath and one other person to his field in the Jeep. The Jeep was driven by deceased Mohan Singh. There was a dispute between Mohan Singh and

Ram Kunwar Vishnoi with respect to the land. Ram Kunwar had threatened Mohan Singh to see him. This was the reason of his accompanying Mohan Singh. He had also visited with Mohan Singh and others to the field of Dhukal Ram. They left the field of Dhukal Ram after talking to him for supply of water. When they were near the Jod Wala Khet, there was firing from the estern side. Mohan Singh put the vehicle in the disputed field. He got down from the Jeep and inquired from Ram Kunwar for the reason of firing the gun. Ram Kunwar fired at him from a close range. Gajpal Singh occupied the driving seat and drove towards the hut. He got down and escaped. When Gajpal Singh drove the vehicle, Brij Lal and Sahib Singh came in front carrying guns in their hands. Gajpal Singh put the vehicle in reverse gear. Sahib Singh fired the gun hitting Jeewan Singh, who was sitting on the rear side of the Jeep. He fell down in the Jeep and died. Thereafter, Brij Lal fired the gun hitting the mirror of the Jeep. There were pellets injuries on the face of Gajpal Singh. He rushed to the Village and informed about the incident to Manvendra Singh. After 14-15 days he was medically examined. In the cross examination, he admitted that there was a dispute between Mohan Singh and Sahib

Singh with respect to the land in dispute. He admitted that he had gone with Mohan Singh for his protection as there was a threat of life given by Ram Kunwar. However, he denied that they carried with them guns, swords, Dharias and lathies.

23. P.W.4 Manvendra Singh is the son of deceased Mohan Singh. He deposed that on 21.11.99 at about 12 Noon his father had gone to their field known as **Soleh Bigha Wala Khet** along with Jeewan Singh, Kishan Singh, Choth Nath, Gajpal Singh. After some time it was reported by Choth Nath and Kishan Singh that Ram Kunwar, Sahib Singh and Brij Lal with two other persons had opened fire at Mohan Singh and others. He immediately moved to the place of incident. He found Jeewan Singh and Mohan Singh lying dead. Gajpal Singh was seriously wounded. He sustained injury on the eye. He immediately removed them to the hospital. Jeewan Singh and Mohan Singh were declared dead in the Hospital. Gajpal Singh was referred to the Hospital at Ajmer. He submitted the First Information Report Ex.P6 in the Hospital. He has also deposed that the police inspected the site in his presence and seized the incriminating articles like pieces of glass, live and

empty cartridges etc. In the cross examination, he admitted that the land in dispute belonged to Jagdish Singh and his wife Sukhraj Kanwar. He pleaded ignorance if the land was sold to Ram Kunwar and Sahib Singh by Smt.Naresh Kanwar. He also admitted that Choth Nath and Dhukal Ram were in their employment. The entire defence was put to him, which he denied. He also deposed that his father had arrived in Village Rohisa from Jaipur at about 9 A.M.

24. P.W.21 Champa Lal is the neighbour of the filed of accused Ram Kunwar. He deposed that on the date of incident, he was in his field. He heard of indiscrimnate firing from the field of the accused persons i.e. **Jod Wala Khet** at about 12 Noon. The field was being cultivated by appellants Brij Lal and Sahib Singh. Brij Lal and Sahib Singh had purchased the said land from Smt.Naresh Kanwar. The villagers had arrived on the said field in order to take forcible possession. This witness was declared hostile on the request of the Public Prosecutor. In the cross examination, he admitted that he was cultivating the field in the share of appellant Brij Lal. He also admitted that about 8-9 months prior to the date of occurrence the land was

being cultivated by appellants Brij Lal and Sahib Singh. They also constructed a hut thereon. He also admitted that on the date of incident he heard the firing from the field namely **Jod Wala Khet**. Large number of people had arrived in jeeps and tractors carrying guns and lathies in their hands. He also admitted that the mob had damaged the crop.

25. P.W.18 Smt.Maina is the wife of P.W.21 Champa Lal. She deposed that her family was cultivating the field of Ram Kunwar for last 6-7 years. The land in dispute was in cultivatory possession of Ram Kunwar and Sahib Singh. At about 12 – 1 Noon large number of people in jeeps and tractors arrived at the field known as **Jod Wala Khet**. At that time they were working on their field. She heard gun shooting from the said field. Hearing of the gun shootings she along with her husband and children moved towards the tank. Later on she came to know that in the incident Thakur Mohan Singh died. She also stated that Mohan Singh and others had arrived in tractors and jeeps with a view to damage the crop. In the cross examination, she admitted that the land in dispute was in the cultivatory possession of appellant Sahib Singh and accused Ram

Kunwar and at the time of incident, crop of Raiyada (Mustard) was standing there. The said land was purchased by Ram Kunwar and Sahib Singh from Smt.Naresh Kanwar. She had never seen or heard possession of Thakur Mohan Singh over the land in dispute. The hut was constructed by the Vishois (appellants) on the said land.

26. Apart from the said witness of occurrence, prosecution also examined certain formal witnesses, P.W.2 Hadman Nath, P.W.3 Mool Chand, P.W.6 Girdhari Singh and P.W.17 Padam Singh as Motbirs and P.W.10 Sohan Lal, P.W.11 Yogiraj Singh, P.W.12 Gopal Singh, P.W.24 Ramchandra, P.W.25 Himmat Singh and P.W.27 Rameshwar Lal as police witnesses. P.W.15 Chhotu Ram is the photographer. P.W.20 Bhagwan Singh has deposed with respect to the inspection of the Jeep.

27. P.W.9 Sawai Ram is the Patwari. He stated that during the period 8.8.1998 to 16.3.2002 he was posted as Patwari of Village Rohisa. He brought with him the revenue record of Khasra No.720. He stated that during Samvat Year 2052 to 2055 no land was entered in the name of Mohan Singh. The Khasra No.726 was entered

in the name of Smt.Sukhraj Kanwar during the period of Samvat Year 2052 to 2055. He also stated that before the land in dispute was in possession of the Tehsildar being receiver appointed by the court. In the cross examination, he admitted that on the date of incident in half of the field there was a standing crop of Raiyada. There was also a hut constructed thereon.

28. P.W.30 Narottam Singh investigated the case at initial stage. He has given the details of the investigation. Later on P.W.31 Khemraj took over the investigation from P.W.30 Narottam Singh as per the directions of Superintendent of Police, Nagaur. He stated that he had recovered a rifle from the possession of appellant Brij Lal vide Ex.P34 in pursuance of the information given by him vide Ex.P36. He has also given the details of the recoveries of other incriminating articles.

29. The appellant Sahib Singh examined himself in defence as D.W.1. He deposed that on 20th February, 1999, he along with his brother Ram Kunwar purchased the land in dispute measuring 64 Bighas & 11 Biswas from Smt.Naresh Kanwar. He has produced the

registered sale-deeds Ex.D13 and Ex.D14. After purchasing the land they constructed a hut thereon for their residence. Deceased Mohan Singh of Rohisa had threatened him and his brother to dispossess them from the land in dispute. Thus, two separate suits were filed in the court of Assistant Collector, Merta seeking injunction against Mohan Singh not to interfere with their possession. He produced certified copies of injunction orders as Ex.D15 & Ex.D16 dated 8.6.99. He also stated that Mohan Singh filed a civil suit in the court of District Judge, Merta for cancellation of the sale-deeds. The District Court had appointed Advocate Anand Singh Shekhawat as the court commissioner for the inspection of the site. He also placed on record the report of the court commissioner Ex.D17. As per the report of the court commissioner the appellants were in the cultivatory possession of the land in dispute. The learned District Judge, Merta considering the entire material including the inspection report found no prima facie case in favour of Mohan Singh and as such rejected the application for temporary injunction. He placed on record a copy of the order Ex.D20 rejecting the application of Mohan Singh for temporary injunction. He further deposed that at the residence of

Mohan Singh number of people had assembled and preparation was made to march for taking forcible possession over the field namely **Jod Wala Khet**. Prior to the incident an information was given to the police through his son Sunil about the contemplated attack of Mohan Singh on the land in dispute. He further stated that in the Noon about 12 while they were working in the field Mohan Singh along with large number of people arrived in jeeps and tractors. They were carrying guns, lathies and Farsies in their hands. Mohan Singh was accompanied by Jeewan Singh, Devraj Singh, Manvendra Singh, Kishan Singh, Vinod Singh, Choth Nath, Dhukal Mali, Asuram Satiya, Jagdish Kalal, Dariyav Singh, Bhanwar Singh, Pushpendra Singh etc. They drove the tractors and jeeps in the field and destroy the standing crop of Raiyada. On asking them to desist from doing so, they started firing indiscriminately. His father sustained injuries. His father also fired the gun in air to disperse them. On the basis of their statements the police registered a case. A copy of the F.I.R. was placed on record as Ex.D12/1. He also produced the injury reports Ex.D21 and Ex.D22. He further stated that a charge-sheet has been filed against 8 accused persons for causing injuries to

his father and others. He further deposed that the land in dispute was attached by the S.D.M., Merta in proceedings under Section 145/146 Cr.P.C. Later on the order of attachment was vacated and the possession of the land in dispute was delivered to them. A copy of the order has been placed on record as Ex.D26. In the cross examination he denied the suggestion that on 15.6.99 when the court commissioner Anand Singh visited the site Ram Kunwar was moving there carrying a 12 Bore Gun in his hand. He also denied the suggestion that they had threatened the court commissioner and others to kill them if they enter in the field. He also denied the suggestion that on 12.11.99 Ram Kunwar fired the gun shot at Mohan Singh. He also denied the suggestion that he fired the gun shot at Jeewan Singh. The defence also examined Dr.Akhil Gupta as D.W.2. He deposed that he was one of the member of the Medical Board, which examined Brij Lal aged 75 years. He has given the details of the injury reports, which we have already referred to in the earlier part of the judgment. He has also proved the injury report of appellant Sahib Singh.

30. The question arises for consideration is, whether

the incident has taken place in the manner alleged by the prosecution and in the facts and circumstances of the case the appellants could be held to have acted in the right of private defence or it is a case of free fight or exceeding the right of private defence.

31. The main features of the case which as emerged are that there has been hostility between the parties as to the land in dispute i.e. **Jod Wala Khet**, the prosecution witnesses belonged to one fraction, in the occurrence in which two persons died, 4 prosecution witnesses sustained injuries and the appellants also sustained injuries which have not been explained by the prosecution. Both the versions of the incident have come at the earliest.

32. The occurrence had taken place in the field known as **Jod Wala Khet**. The land consists of 64 Bighas & 11 Biswas. It is not in dispute that there has been a dispute between the prosecution and accused parties with respect to the said land. The prosecution has not produced any evidence worth the name to show that the said land was of the ownership or in possession of deceased Mohan Singh. The prosecution has examined

P.W.9 Sawai Ram, Patwari of the area, but he has also not stated anything either supporting the prosecution or the defence as to the ownership or possession of the said land. The defence has produced the oral and documentary evidence to show that the subject land was of their ownership and cultivatory possession. The specific case of the defence is that the subject land was purchased from Smt.Naresh Kanwar by registered sale-deeds Ex.D13 & Ex.D14 dated 20th February, 1999. After the purchase, they constructed a hut and cultivated the land. Deceased Mohan Singh had threatened them to dispossess from the land. Thus, apprehending the dispossession both the brothers namely Ram Kunwar and Sahib Singh filed two separate suits in the court of Assistant Collector, Merta for permanent injunction restraining Mohan Singh and his party from interfering with their peaceful possession. The revenue court granted injunction by order dated 8.6.99 restraining the deceased Mohan Singh from interfering in the possession of the appellant Sahib Singh and other accused Ram Kunwar. Copies of the orders have been placed on record as Ex.D15 & Ex.D16. A civil suit was also filed by deceased Mohan Singh for cancellation of the sale-deeds. In the said proceedings

the court commissioner namely Advocate Anand Singh Shekhawat inspected the site. The court commissioner found the land in possession of the appellants. The report has been placed on record as Ex.D17. The learned District Judge, Merta decided the application filed by deceased Mohan Singh for temporary injunction vide Ex.D20. Certified copies of the orders have been placed on record. The learned District Judge decided all the three essential ingredients against deceased Mohan Singh i.e. prima facie case, balance of convenience and irreparable injury. Thus, the trial court on appreciation of evidence recorded a finding to the effect that on the date of occurrence the land in dispute namely **Jod Wala Khet** was in cultivatory possession of the accused persons. This finding has rightly been not challenged either by the learned Public Prosecutor or the counsel for the complainant.

33. In the above background, let us now analyse the oral and documentary evidence, if the incident had taken place in the manner alleged. Learned counsel has made good deal of argument that the prosecution party was the aggressor inasmuch as there was no occasion for them to be on the field of the appellants except to

take possession by force. It is submitted that no reliance can be placed on the testimony of the prosecution witnesses of the occurrence as they are not simply interested or related witnesses but party to a faction of aggressor group interested in their exoneration and conviction of opposite faction.

34. **It is now well settled that relationship of witnesses cannot be the sole ground to discredit the testimony of a witness. Ordinarily, a close relative is the last person to screen real culprit and falsely implicate an innocent person, unless the witness has cause, such an enmity against the accused.** In such cases Court has to adopt a careful approach and analyse evidence whether such is cogent and creditable. Instead of multiplying the authorities, suffice to refer recent decision of the Apex Court in **Sudershan Reddy vs. State**, reported in 2006 AIR (SCW) 3680, wherein beginning from the earliest decision in **Rameshwar vs. State** (1952 SC 54) to latest decision are referred and analysed. **However, where the accused has set up a counter case wherein such witness or witnesses are accused, it must be kept in view that there is a tendency to**

develop and stick to one set of facts only which implicate the accused and exonerate them.

35. In the instant case, the witnesses of the occurrence namely P.W.1 Choth Nath, P.W.5 Gajpal Singh, P.W.16 Vinod Singh, P.W.13 Dhukal Ram and P.W.22 Kishan Singh are accused in the cross case. There is a specific allegation that these persons along with the deceased Mohan Singh and Jeewan Singh armed with weapons arrived in the Jeep with a view to take possession over the land and destroy the crop. There are two other independent witnesses namely P.W.18 Smt.Maina and P.W.21 Champa Lal. P.W.18 Smt.Maina has stated that the accused persons were in cultivatory possession over the land. The prosecution party arrived on the land in jeeps and tractors. It is significant to notice that this witness has not been declared hostile by the prosecution. It is of course true that P.W.21 Champa Lal has been declared hostile by the prosecution. It is evident that appellants apprehending dispossession obtained injunction against deceased Mohan Singh. The deceased Mohan Singh, who ordinarily resided at Jaipur arrived in Village Rohisa along with P.W.16 Vinod Singh in the early

hours of the day of the occurrence. There is a suggestion that Vinod Singh is a person of bad antecedents and as such he was hired by deceased Mohan Singh in his endeavor to dispossess the accused persons from the land in dispute. It is of course true that the suggestion has been denied by P.W.16 Vinod Singh. He has stated that deceased Mohan Singh was his uncle in distant relation. He had on earlier occasions also visited the village Rohisa. However, P.W.4 Manvendra Singh has stated that had not known Vinod Singh. He had never visited Village Rohisa earlier. Thus, there appears to be some substance in the contention of the defence that deceased Mohan Singh who had arrived in the early hours of the day on the date of occurrence had brought with him Vinod Singh for some ulterior purpose. Per contra, the specific case of the prosecution is that on the date of occurrence deceased Mohan Singh had gone to his own field known as **Soleh Bigha Wala Khet** in the Jeep along with Choth Nath, Gajpal Singh, Vinod Singh and Kishan Singh. While returning, they visited the field of P.W.13 Dhukal Ram. A request was made by deceased Mohan Singh to Dhukal Ram for providing a water channel to his field. It is submitted that **Jod Wala** field

does not fall on route from Village Rohisa to **Soleh Bigha Wala** field and as such there was no occasion of passing through or nearby the field of occurrence. A twist has been given of visiting the field of Dhukal Ram only to justify the cause for passing nearby the field of occurrence. It is also submitted that Dhukal Ram was cultivating the land of deceased Mohan Singh on share basis. As such he was his employee for last number of years. In such a situation the deceased Mohan Singh was not expected to visit his field. He could have called him at any time and given such direction. The another significant thing is that P.W.13 Dhukal Ram has admitted in the cross examination that the distance of between his filed and the field of deceased Mohan Singh i.e. **Soleh Bigha Wala Khet** is 2 Kms. and further in between there is field of the accused persons. Thus, it was not at all possible to provide a channel of 2 Kms. passing through the field of the accused persons. They could not have conceived of passing through the channel from the field of the appellants. This fact alone expose the creditability of the prosecution case. For the ready reference the statement of P.W.13 Dhukal Ram is extracted as follows:-

"यह कहना सही है कि ठाकुर मोहनसिंह का 16 बीघा वाला खेत मेरी ढ़ाणी व बेरा से पश्चिम में 2 किलोमीटर दूरी पर है।"

"यह कहना सही है कि मेरे कुआ से श्री मोहनसिंह की इस 16 बीघा जमीन में धौरा से पानी ले जाने के लिए वह धौरा इस झोड़ वाली जमीन में से होकर निकाला जाना था।"

36. Thus, it is evident that there was no reason for the prosecution party to move towards the place of occurrence i.e. **Jod Wala Khet**. Another significant circumstance, which lends support to the specific case of defence that the people had assembled in the fort of Thakur Mohan Singh to execute the plan of dispossessing the appellants from the subject land. The appellant Sahib Singh in his statement as D.W.1 stated that he received an information to the effect that at 7 A.M. Mohan Singh was collecting persons in his house in the morning of the date of occurrence to execute his plan of dispossessing them from the land in dispute. Thus, he sent his son Sunil to approach to Prabhu Singh in Village Jasnagar to flash the information to police. This statement of the accused finds support from statement of P.W.30 Narottam Singh S.H.O., Police Station,Thanvla. In the cross examination, he has admitted that on 12.11.99 at about 11.25 in the

morning he received an information to the effect that certain persons of the Rajput community were proceeding to take possession over the land. The said information was recorded in the Rojnamcha vide Ex.P55. It will be useful to extract the contents of Ex.P55 as follows:-

"राजस्थान पुलिस
रोजनामचा आम
(नियम 279)

दि. 12/11/99

पुलिस थाना थावला जिला नागौर

नम्बर शुमार	समय	मजमून रिपोर्ट	खुलासा रिपोर्ट	आदेश
340	11.25 Am 12 .11.99	इस समय ओपरेटर पुलिस थाना मेडता शहर ने जरिये PST इतला दी कि रोहीसा गांव से टेलीफोन आया है कि राजपूत समाज के लोग जमीन पर कब्जा कर रहे हैं SHO साहब पहुचे वगैराह PST VHF प्राप्त होने पर मन SHO नरोतमसिंह मय fc श्री विजयसिंह 289 बंशीलाल 1026 श्री हिम्मतसिंह 140 । बाबूलाल fc 1081 मय एक राईफल 303 बोर 50 कारतुस बट 16 श्री प्रतापराम fc 175 मय राईफल 303 बोर मय 50 कारतुस मय बडोलीयर के सरकारी जीप चालक गोपीसिंह 845 के माफिक PST मोजा रोहीसा रवाना हुआ पहरा थाना हाजा का श्री गोपालसिंह 279 को सम्भलाया चार्ज रोल आप जिम्मे HC श्री भवंरसिंह 387 के किये। sd भवरू खां-259	रवानगी SHO fcs जीप	

असल की नकल की गई ।

The document Ex.P55 is a clinching evidence lending support to the defence to the effect that

deceased Mohan Singh along with certain persons had gone to **Jod Wala** land to take possession of the said land by dispossessing the accused persons. We are of the view that if the defence party was in possession of the land in question there was really no reason for it to be aggressive, and if at all, it was the prosecution party which could have attempted to dispossess the accused persons by use of force. Thus, it clearly appears that the prosecution witnesses of occurrence have not given the true account of the incident. The version of the prosecution to the effect that Mohan Singh had gone to see his own field namely **Soleh Bigha Wala Khet** along with Jeewan Singh, Vinod Singh,Gajpal Singh, Kishan Singh and Choth Nath and while returning he stayed at the field of Dhukal Ram, where he talked to him about providing water channel to him. This clearly appears to be concoction.

37. Turning to the scenario of the place of occurrence, it has been admitted by the Investigating Officer, P.W.30 Narottam Singh that the Jeep of the deceased was parked in the middle of the field. The Raiyada crop was damaged. There were also track of movement of tractor and jeep in the field. This lend support to

defence version that prosecution party arrived in tractors and jeeps and damaged the crop. This also falsifies the prosecution version to the effect that while they were just passing through the road, abruptly Ram Kunwar came in front of the vehicle and fired the gun. In order to justify the presence of vehicle (jeep) inside the field the prosecution witnesses have gone to the extent of saying that seeing Ram Kunwar firing, deceased Mohan Singh drove the jeep inside the field. It is further stated that he got down and questioned Ram Kunwar for his abnormal behaviour. It is beyond comprehension that in such a situation seeing the enemy firing the gun, a person to save himself instead of finding a way to get out will enter into the field of enemy and question him for the reason of firing. The prosecution version, clearly appears to be after thought to cover up the initial fault of driving the vehicles in the field and damage the crop with ultimate object to take forcible possession.

38. In this background, the plea of the accused appellants of exercise of their right of private defence is required to be considered. The first question, which arises for consideration is what is the effect of non-

explanation of injuries sustained by the accused persons. A Division Bench of this Court had an occasion to examine the law in great detail in **Abdul Khan & ors. vs. State of Rajasthan** reported in 2006(5) RDD page 2949 to which one of us (Mathur J.) was a party. This Court after surveying almost all the cases on the point beginning from **Mohan Rai vs. State of Bihar** reported in A.I.R. 1968 S.C. page 1281 to the latest decision of the Apex Court in **Triloki Nath & Ors. vs. State of U.P.** reported in 2005(9) Scale page 76 held that **there is no rule that whenever the accused sustain any injury in the same occurrence, the prosecution is obliged to explain injury and on the failure of proposition to do so the prosecution case should be disbelieved. Before non-explanation of injuries on the person of accused persons by the prosecution may affect the prosecution case, the Court has to be satisfied of the existence of two conditions: (i) that the injuries on the person of the accused were of a serious nature; and (ii) that such injuries much have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of**

interested and partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution.

39. In the instant case a reddish brown spot of fire arm(Pellets) on left side of back of chest was noticed on the person of appellant Brij Lal. His X-Ray report showed presence of a round metal piece at the side of lung. Though, the injuries are simple in nature but it does suggest that the injury must have been sustained in the subject occurrence. The appellant Sahib Singh has sustained as many as 11 injuries caused by fire arm. His X-Ray report showed many metallic round pieces in the body. From these injuries the only reasonable inference can be drawn is that both the accused persons received injuries during the course of the occurrence which were inflicted on them by some members of the prosecution party. However, non-explanation of injuries on these two accused persons does not affect the prosecution case as a whole but in a case of this nature the plea of right of private defence of the appellants is required to be considered in right perspective. It is of course true that for this reason the prosecution case in its entirety cannot be rejected, yet

the right of private defence of the appellants is required to be scrutinized carefully.

40. Thus, the precise question falls for consideration is, the prosecution party being initially at fault, to what extent the harm which could be lawfully inflicted in self defence? The right of private defence of person and property is codified in Sections 96 to 106 of the Penal Code. In fact these Sections confer and define the limits of right of private defence, constitutes general exception to the offences defined in the Code. These Sections are part of Chapter IV under the heading **General Exceptions**. Section 96 declares that an act done in exercise of right of private defence is not an offence. Section 97 proceeds to divide right of private defence in two parts. The first part relating to right of private defence of his body, and the body of any other person, against any offence affecting him and the second part deals with the property whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft,

robbery, mischief or criminal trespass. This Section is to be read subject to restrictions/limitations provided by Section 99 i.e. firstly there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities and secondly the right of private defence in no case extends to inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 98 deals with the right of private defence against the act of a person of unsound mind or intoxicated. Section 100, 101, 102 and 106 deals with the right of private defence of person i.e. body, Sections 103, 104 and 105 deals with the right of private defence of the property.

41. Section 100 justifies the killing of a assailant when an apprehension of description in several clauses is caused. Of course it has to be read subject to the restrictions/limitations provided under Section 99. Four cardinal conditions must have existed before taking of life of a person is justified on the plea of self defence. Firstly, the accused must be free from fault in bringing about the encounter; secondly, there must be present and impeding peril to life or of great bodily harm, either real or so apparent as to create honest belief an

existing necessity; thirdly, there must be no safe or reasonable mode of escape by retreat; and fourthly, there must have been a necessity for taking life. Section 101 supplement the provisions of Section 100 provides that if the offence be not of any of the description enumerated in the last preceding section, the right of private defence of body does not extend to voluntarily causing death of the assailant, but it extends, under the restrictions mentioned in Section 99, to the voluntarily causing to the assailant of any harm other than death. In other words, where the violence of person or liberty is not of aggravated nature of the offence mentioned in Section 100, it may still be resisted by any necessary degree of violence short of killing. Thus, under Section 100 a person is entitled to exercise his right of private defence of body as against any assault other than first and second of Section 100 to the extend of causing grievous hurt. Section 102 indicates when the right of private defence of body commences and till what time it continues. It commences and continues as long as danger to the body last.

42. Turning to right of private defence of property,

Section 103 furthers the right of private provided by Section 97 under the restrictions mentioned in Section 99, to voluntarily causing of death, if the offence, the committing of which or attempting to commit which occasions, the exercise of right falls in one of the categories mentioned therein. That is to say if it was not one of the offences enumerated therein, the person had no right of private defence extending to voluntarily causing of death. Homicide is justified in case of robbery, house breaking by night, arson, theft, mischief of house trespassing causing apprehension of death or grievous hurt. Section 104 is further supplement of Section 103. It provides that if the offence, the commission or the attempt to commit which occasions the exercise of right of private defence, be theft, mischief, or criminal trespass, but not of any of the description enumerated in Section 103, the right will not extend to the voluntarily causing death, but does extend, subject to restrictions mentioned in Section 99, to the voluntarily causing to the wrong doer of any harm other than death. Thus, right under Section 103 extends to voluntarily causing death provided, there are such circumstances, as may reasonably cause apprehension that death or grievous

hurt will be the consequence of such right of private defence is not exercised. But where there is absolutely no indication that the trespass showed any fight or semblance of fight, the right, if any, would come under Section 104, which does not extend to the voluntarily causing of death but extends subject to the restrictions mentioned in Section 99 to voluntarily causing, wrong doer any harm other than death. Section 105 lays down, when the right of private defence against the specified offences pertaining to property commences and how long it continues. It commences as soon as a reasonable apprehension of danger to property commences. The right continues till (i) the offender has effected his retreat with the property or (ii) the assistance of the public authorities is obtained or (iii) the property has been recovered. Similarly the right of private defence of property against robbery continues as long as the offender causes or attempts to cause any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or instant personal restraint continues. As against criminal trespass or mischief it continues as long as the offender continues in the commission of criminal trespass or mischief. As against house breaking by

night it continues as long as house trespass which has been begun by such housebreaking continues.

43. The right of private defence is summed up by the Apex Court in **Dominic Varkey vs. State of Kerala** reported in A.I.R. 1971 SC 1208,

> "Broadly stated, the right of private defence rests on three ideas, first, that there must be no more harm inflicted than is necessary for the purpose of defence; secondly, that there must be reasonable apprehension of danger to the body from the attempt or threat to commit some offence and, thirdly, the right does not commence until there is a reasonable apprehension. It is entirely a question of fact in the circumstances of a case as to whether there has been excess of private defence within the meaning of the 4th clause of section 99 of the Indian Penal Code, namely, that no more harm is inflicted than is necessary for the purpose of defence. No one can be expected to find any pattern of conduct to meet a particular case. Circumstances must show that the Court can find that there was apprehension to life or property or of grievous hurt. If it is found that there was apprehension to life or property or of grievous hurt the right of private defence is in operation. The person exercising right of private defence is entitled to stay and overcome the threat."

44. Next, the question of nature and extent of burden that the accused has to discharge under Section 105 of

the Evidence Act has been of great importance and for considerable time the opinions of the courts were not uniform. It will be advisable to get acquainted with some of the leading precedents. To start with the earliest decision of the Apex Court in **Jumman vs. State of Punjab** reported in A.I.R. 1957 SC 469, wherein the Court observed,

> "In such a case where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor, would it be correct to assume private defence for both sides? We are of the view that such a situation does not permit of the plea of private defence on either side and would be a case of sudden fight and conflict and has to be dealt with under Section 300 I.P.C. Exception 4."

45. In **K.M.Nanavati vs. State of Maharashtra**, reported in A.I.R. 1962 SC 605, the court observed thus,

> "The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Sec.105 of the Evidence Act is more imaginary than real. Indeed, there is conflict at all. There may arise three different situations: (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused ..... (2) The special burden may not touch the ingredients of the offence, but only the protection given

> on the assumption of the proof of the said ingredients ... ... (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence ..... In the second case, the burden of bringing the case under the exception lies on the accused ..... the general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence."

46. In **Dahya-bhai vs. State of Gujarat** reported in A.I.R. 1964 SC 1563, the Court observed,

> "The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions.
>
> (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.
>
> (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime ..... the accused may rebut it by placing before the Court all the relevant evidence oral,

> documentary or circumstantial but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.....”

47. In **Harbhajan Singh vs. State of Punjab** reported in A.I.R. 1966 SC 97, it was observed on page 101:

> “Where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds in proving a preponderance of probability.”

48. Similarly, in **V.D.Jhingan vs. State of U.P.** reported in A.I.R. 1966 SC 1702, it was observed on page 1764:

> “It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability.”

49. Likewise, in **Munshi Ram vs. Delhi Administration** reported in A.I.R. 1968 SC 702, it was observed on page 703:

> "It is well settled that even if an accused does not plead self-defence it is open to the Court to consider such a plea if the same arises from the material on record ..... The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

50. In **Mohd. Ramzani vs. State of Delhi** reported in A.I.R. 1980 SC 1341, it has been observed,

> "the onus which rests on the accused person under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged beyond reasonable doubt."

51. In **Vijayee Singh and Ors. vs. State of U.P.** reported in 1990 SCC(Cri.) 378, it has been observed,

> "The general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the cases covered by Section 105 the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of

> his plea directly or rely on the prosecution case itself or, as stated above, he can indirectly introduce such circumstances by way of cross-examination and also rely on the probabilities and the other circumstance. Then the initial presumption against the accused regarding the non-existence of the circumstances in favour of his plea gets displaced and on an examination of the material if a reasonable doubt arises the benefit of it should go to the accused. The accused can also discharge the burden under Section 105 by preponderance of probabilities in favour of his plea. In case of general exceptions, special exceptions, provisos contained in the Penal Code or in any law defining the offence, the court, after due consideration of the evidence in the light of the above principles, if satisfied, would state, in the first instance, as to which exception the accused is entitled to, then see whether he would be entitled for a complete acquittal of the offence charged or would be liable for a lesser offence and convict him accordingly."

52. In **Rizan & Anr. vs. State of Chhatisgarh** reported in 2003 Cri.L.J. 1226, it has been observed,

> "Under Section 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets of the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting

> necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

53. Thus, it emerges that **the burden of proving the existence of circumstances which would bring the case within the general exception of the right of private defence is upon the accused and the court must presume the absence of such circumstances. The burden which rests on the accused to prove that any of the general exceptions is attracted does not absolve the prosecution from discharging its initial burden and truly, the primary burden never shifts save when a statute displaces the**

presumption of innocence; "indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence."

54. The burden on an **accused to establish plea of self defence is not as onerous as the one which lies on the prosecution, while the prosecution is required to prove the case beyond reasonable doubt, the accused may establish the plea by preponderance of probabilities. The accused need not necessarily plead the plea of self defence specifically, if the circumstances indicate that accused acted in right of private defence, the court can consider such a plea. The accused may lead evidence to prove the defence or may after proof relying on the evidence produced by the prosecution, the material elicited by cross examining the prosecution witnesses and totality of the facts and circumstances emerging from the evidence in the case.**

55. In the earlier part of the judgment, we have found that defence party was in possession over the land in

question. In identical situation the Apex Court in **Vajrapu Sambayya Naidu & Ors. vs. State of A.P. & Ors.** reported in 2004(10) SCC 152 observed that once it is held that defence party was in possession of the land in question, the complexion of the entire case changes because in such event the appellants cannot be held to be aggressors. In such case the defence probabilise that they were defending their possession when members of the prosecution party sought to dispossess them by use of force.

56. In the instant case, evidently deceased Thakur Mohan Singh with his uncle deceased Jeewan Singh, Vinod Singh and others in a Jeep went to the field, which was in cultivatory possession of the appellants with a design to forcibly dispossess them in disregard to the court injunction restraining him not to interfere with the possession of the appellants. Thus, they themselves were the lawless authors of situation in which they found themselves. A person protecting his life or property is not expected to modulate his defence step by step or tier by tier, but Section 99 provides that the right of private defence in no case extend to inflicting more harm than it is necessary to inflict for

the purpose of defence. Obviously, as observed in Vajrapu Sambayya Naidu's case(supra) if the defence party was in possession of the land in question, there was really no reason to commit the aggression, and if at all, it was for the prosecution party which could have attempted to dispossess the appellants by use of force. In the circumstances of the case, the appellants were certainly entitled to use reasonable force to resist the members of the prosecution party but without causing death. Thus, as far as appellant Brij Lal is concerned, he alleged to have fired gun causing injuries to P.W.5 Gajpal Singh. As per the injury report Ex.P50 he suffered simple fire arm injuries. In the facts of the case, it was reasonable to use the force to that extent to resist the members of the prosecution party. Thus, we are of the view that learned Judge has committed error in convicting him of offence under Section 302/34 I.P.C. He is entitled to be acquitted of the said charge. However, on careful consideration of the entire matter, we are of the view that appellant Sahib Singh exceeded the right of private defence in causing death of Jeewan Singh. **It is of course true that prosecution party was aggressor as such he had right of private defence of property, but there is**

nothing to show that in anyway there was threat to any body's life from prosecution faction. Thus, in shooting Jeewan Singh, who was sitting in the Jeep, appellant caused more harm than necessary. Thus, his case falls under Exception (2) of Section 300 I.P.C. punishable under Section 304 Part II I.P.C. which reads as under:-

> **Exception 2.-** Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

57. The case is squarely covered by the decision of the Apex Court in **Baijnath vs. State of Bihar** reported in A.I.R. 1993 SC 2323. In the said case the plea of the accused was that they were in possession of the land in dispute and on the day of occurrence two deceased persons along with other armed persons arrived to dispossess them and also inflicted injuries on two of the accused persons. The doctor found some simple injuries on the person of the accused persons. The High Court acquitted three of the accused persons

but convicted two person of offence under Section 304 Part-II/ Section 34 I.P.C. the Apex Court upheld the decision of the High Court holding that accused exceeded the right of private defence. Thus, we are fortified in our view by the decision of the Apex Court in Baijnath's case(supra) that the case in hand is of exceeding of right of private defence punishable under Section 304 Part-II I.P.C.

58. It is submitted by the learned counsel that in Baijnath's case(supra) the accused persons were sentenced to 2 years rigorous imprisonment and as such in the instant case as well the appellant Sahib Singh be also similarly treated. As far as sentence part is concerned, the authority does not help the appellant as Sahib Singh is in Jail since the date of occurrence i.e. the year 1999.

59. Coming to the State appeal being D.B.Criminal Appeal No.185/2005, the learned Special Judge, SC/ST (Prevention of Atrocities) Cases, Merta in Sessions Case No.66/2003 by judgment dated 28.8.2004 has acquitted all the accused respondents namely Gajpal Singh, Choth Nath, Ashu Ram, Jagdish, Dhukal Ram, Bhanwar

Singh, Vinod Singh and Kishan Singh. The instant case was registered on the Parcha Bayan Ex.P7 of P.W.12 Sahib recorded by Jahangir Khan, Incharge of the Police Station on 13.11.99 in the hospital. It was stated that he along with his brother Ram Kunwar had purchased a land measuring 64 Bighas & 11 Biswas known as **Jod Wala Khet** from Smt.Naresh Kanwar in February, 1999. They were in cultivatory possession of the said land. On 12.11.99 his father P.W.1 Brij Lal, son P.W.8 Sunil, daughter P.W.13 Sunita, wife P.W.5 Rajbala, Bhabhi P.W.4 Smt.Krishna and niece P.W.6 Raju were ploughing the crop in the field. His brother Ram Kunwar had gone to Jaipur on 10.11.99. At about 12 -1 deceased Mohan Singh, deceased Jeewan Singh and respondents Devraj Singh, Gajpal Singh, Kishan Singh, Manvendra Singh, Choth Nath, Ashu Ram, Jagdish Lal, Bhanwara, Pushpendra Singh, Dariyab Singh, Dhukal Ram and 5-7 persons arrived in 3 jeeps and 3 tractors armed with deadly weapons with a view to forcibly dispossess them from the subject land. When his father ran towards the hut to save his life Manvendra Singh fired at him causing fire arm injury on his leg. Thereafter, Kishan Singh fired the gun causing injuries on his person. Pushpendra Singh also fired causing

injuries on his person. His father fired the gun in air to disperse them. They damaged the crop. After some time they escaped from the place of incident. They incurred the displeasure of Thakur Mohan Singh on purchase of subject land from Smt.Naresh Kanwar. Thakur Mohan Singh wanted to take possession over the land. On this information police registered a case for offence under Sections 147, 148, 149, 447, 427, 307 & 323 I.P.C. and Section 3/25 of the Arms Act. On charge-sheet being filed the case was tried by the learned Special Judge. The prosecution produced oral and documentary evidence to prove the case.

60. Out of 21 witnesses, prosecution examined P.W.1 Brij Lal, P.W.4 Smt.Krishna, P.w.5 Rajbala, P.W.6 Miss Raju, P.W.8 Sunil Kumar and P.W.12 Sahib Singh as witnesses of occurrence. P.W.2 Padam Singh, P.W.3 Inder Singh, P.w.7 Jabbar Singh, P.W.9 smt.Maina, P.W.10 Champa Lal and P.W.17 Sugna Ram did not support the prosecution case and they were declared hostile. Thus, it is evident that all the witnesses of occurrence are witnesses from the family of P.W.1 Brij Lal. We have already referred to the injury reports of Brij Lal and Sahib Singh while dealing with the appeal

filed by them.

61. We have carefully scrutinized the entire evidence. The presence of Manvendra Singh on the sport could not be established. The prosecution has failed to show as to how in the said occurrence Mohan Singh and Jeewan Singh died. The effect of non-explanation is fatal and leads to the inference that the appellants have not given the true genesis of the case. Thus, we are of the view that the trial court has rightly discredited the entire prosecution case. No interference is warranted with the judgment of acquittal.

59. In view of the aforesaid, both the appeals are disposed of as follows:-

(1) D.B.Criminal Appeal No. 896/2004 – Brij Lal & Anr. Vs. State is partly allowed. **Brij Lal** is acquitted of all the charges levelled against him. He is on bail. His bail bonds stand discharged. The conviction of second appellant **Sahib Singh** is converted to offence under Section 304 Part-II I.P.C. He is sentenced to the period already undergone. He is in Jail. He shall be released forthwith, if not required in any other case.

(2) D.B.Criminal Appeal No.185/2005 – State of Rajasthan vs. Gajpal Singh & Ors. being devoid of merit stands dismissed.

(R.P. VYAS), J. **(N.N.MATHUR), J.**

BKS/-